

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ELMAR HIRSCH)	
Claimant)	
VS.)	
)	Docket No. 1,025,638
TRANSAM TRUCKING, INC.)	
Self-Insured Respondent)	

ORDER

Both respondent and claimant appealed the June 23, 2008, Award entered by Administrative Law Judge Kenneth J. Hursh. The Workers Compensation Board heard oral argument on September 16, 2008.

APPEARANCES

Mark E. Kolich of Lenexa, Kansas, appeared for claimant. Fred Bellemere, III, of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a July 15, 2005, accident that occurred when a train struck the tractor-trailer claimant was driving. In the June 23, 2008, Award, Judge Hursh awarded claimant a 23 percent permanent partial disability under K.S.A. 44-510e for the functional impairment claimant sustained to his low back, right knee, and head. More specifically, the Judge found claimant sustained: (1) a 7.5 percent whole person impairment to his low back; (2) a 3.5 percent whole person impairment to the right knee; and (3) a 14 percent whole person impairment for injury to his head. The Judge determined claimant failed to prove he sustained permanent injury to his ribs and also failed to prove the accident either aggravated his preexisting kidney disease or injured his kidneys.

No claim was made for a work disability¹ as claimant has returned to work with another company. Accordingly, Judge Hursh combined the functional impairment ratings for the injuries to claimant's low back, right knee, and head to find claimant sustained a 23 percent permanent whole person impairment.

Further, Judge Hursh found respondent was liable for the medical expenses incurred through October 28, 2005, that were related to evacuating claimant's subdural hematoma towards the *right* side of his skull, but respondent was not liable for those medical expenses incurred after October 28, 2005, that were related to evacuating claimant's subdural hematoma towards the *left* side of his skull.

Finally, Judge Hursh determined this claim was not barred by K.S.A. 44-501(d) for two reasons. First, in the event claimant was not wearing his seat belt when the accident occurred, the evidence failed to show that such omission was willful. And second, the Judge found the evidence failed to prove that claimant's injuries were related to failing to use a seat belt. In short, the Judge held claimant's injuries did not result from his willful failure to use a safety device.

Respondent contends Judge Hursh erred. Respondent first argues this claim is barred under K.S.A. 44-501(d) because claimant willfully failed to use a safety device, his seat belt. Second, respondent asserts claimant failed to prove he sustained a head injury and, therefore, he should receive neither disability nor any medical benefits for that alleged injury. Accordingly, respondent requests the Board either to deny this claim or, in the alternative, modify the June 23, 2008, Award.

Claimant also contends the Judge erred. Claimant argues he is entitled to receive permanent disability benefits for a 30 percent whole person impairment for injuries he sustained to his low back, head, pelvis, and right knee and for decreased kidney function. Furthermore, claimant argues the medical opinions of Dr. P. Brent Koprivica and Dr. Vito J. Carabetta are uncontradicted that claimant's subdural hematoma resulted from the accident. In summary, claimant requests the Board to increase his permanent partial disability to 30 percent and require respondent to pay all the medical expenses claimant incurred for his subdural hematoma.

The issues before the Board on this appeal are:

1. Is this claim barred under K.S.A. 2005 Supp. 44-501(d) for willful failure to use a safety device?

¹ A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating and is determined by averaging claimant's wage loss and task loss.

2. If not, what is the nature and extent of claimant's injuries and functional impairment?
3. Is respondent obligated to pay the medical expense for evacuating the subdural hematoma?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes: (1) this claim is not barred by K.S.A. 2005 Supp. 44-501(d), (2) claimant did not establish he sustained a permanent injury or impairment to his kidneys, (3) respondent is obligated to pay all the medical expense for claimant's subdural hematoma, and (4) claimant sustained a 23 percent whole person functional impairment due to his work-related accident.

On July 15, 2005, claimant was injured in Sioux City, Iowa, when a train struck the loaded tractor-trailer he was driving. Claimant does not recall the accident but the record indicates the train struck the passenger side of claimant's truck near the sleeper cab. He was found in the wreckage crouched between the seats and not wearing his seat belt, which claimant swears he wore religiously. He does not recall telling paramedics at the accident scene that he was not wearing his seat belt at the time of the accident. Claimant remembers little of the first several days following the accident while convalescing in a hospital.

The accident fractured and displaced claimant's seventh, eighth, ninth, and tenth right ribs, and caused a large hematoma extending from claimant's low back into the right buttock. The accident and hospital records also indicated claimant had trauma to the head as well as memory loss, shaking, and jerking while in the hospital and a decreased state of consciousness and confusion at the accident scene.

Claimant had polycystic kidney disease before the accident. When he entered the hospital, claimant had an abnormally high creatinine level of 2.3 grams per deciliter² as compared to the .8 to 1.0 level that is considered normal. Although he experienced acute renal failure while in the hospital, his creatinine level was down to 1.9 on July 22, 2005, when he was discharged.

Following the accident claimant experienced headaches. In October 2005 those headaches progressively worsened and claimant sought emergency room treatment. CT scans of the head revealed bilateral fluid collections. Claimant was hospitalized and

² Koprivica Depo., Ex. 2, Resp. Ex. 3.

received the first of two surgeries to evacuate his subdural hematoma. Claimant underwent the second surgery to evacuate the subdural hematoma in February 2006.

Claimant did not return to work for respondent after recovering from his accident. Instead, respondent terminated claimant. Fortunately, claimant began driving for another employer in July 2006 and began earning a comparable wage. Accordingly, claimant's request for permanent disability benefits is limited to those for his permanent functional impairment.

1. Is claimant barred from receiving benefits for willfully failing to use a safety device?

The Judge determined this claim was not barred as the evidence failed to establish that claimant was not wearing his seat belt at the time of the accident. The Judge also found the evidence failed to establish claimant had willfully refused to use his seat belt. Likewise, the Judge found this claim was not barred as the accident would have occurred regardless of claimant's seat belt use.

The Board agrees this claim is not barred by K.S.A. 2005 Supp. 44-501(d)(1). That statute provides:

If the *injury* to the employee *results* from the employee's deliberate intention to cause such injury; or *from the employee's willful failure* to use a guard or protection against accident required *pursuant to any statute* and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, *any compensation in respect to that injury shall be disallowed*. (Emphasis added.)

And the Kansas appellate courts have held that a "willful" failure to use a guard or protection includes "the element of intractableness, the headstrong disposition to act by the rule of contradiction."³

Claimant testified he always uses his seat belt. That testimony is credible. The train struck claimant's truck and drug it several hundred feet down the track, during or after which claimant could have unfastened his seat belt. According to Dr. P. Brent Koprivica, claimant's rib fractures correspond to where the seat belt would cross his body. Like the Judge, the Board is not persuaded that claimant was not wearing his seat belt at the time of the accident. In addition, assuming *arguendo* that claimant was not wearing his seat

³ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, Syl. ¶ 6, 735 P.2d 247, rev. denied 241 Kan. 838 (1987); *Bersch v. Morris & Co.*, 106 Kan. 800, Syl. ¶ 1, 189 Pac. 934 (1920).

belt at the time of the accident, the evidence fails to establish claimant deliberately and willfully refused to wear his seat belt.

In short, the Board concludes this claim is not barred by K.S.A. 2005 Supp. 44-501(d)(1).

2. What functional impairment did claimant sustain?

Judge Hursh determined claimant sustained a 23 percent whole person impairment from the injuries he sustained in his July 15, 2005, accident. More specifically, the Judge found claimant sustained a 7.5 percent whole person impairment from the low back injury, a 3.5 percent whole person impairment from the right knee injury, and a 14 percent whole person impairment from a head injury.

Claimant contends he now has reduced kidney function and, therefore, he has sustained a 30 percent whole person impairment. Conversely, respondent contends claimant should not receive any permanent disability compensation for either his kidneys or any alleged head injury.

Low back and right knee

The parties do not dispute the Judge's findings regarding the impairment claimant sustained to his low back and right knee. Therefore, the Board affirms those findings. The Board concludes claimant sustained a 7.5 percent whole person impairment from his low back injury and a 3.5 percent whole person impairment from his right knee injury.

Kidneys

As indicated above, claimant had polycystic kidney disease⁴ before his accident. And while in the hospital, he experienced renal failure that was probably caused by the dye used in his radiographic studies and reduced blood pressure.

When claimant entered the hospital immediately following the accident, his creatinine⁵ level was 2.3 grams per deciliter, which was abnormally high. Depending upon

⁴ A disease where the tubules of the kidneys develop cysts that expand, which can adversely affect the functioning of the kidneys and cause parts of the kidneys to necrose and die.

⁵ Creatinine is a substance produced by muscle and is continuously released into the bloodstream. When the kidneys fail to function properly, the creatinine level rises. A traumatic event can increase the creatinine level due to the destruction of muscle. Likewise, some blood pressure medications can reduce kidney function as well as low fluid volume and low blood pressure. Moreover, the dyes used in radiographic

a person's muscle mass, normal creatinine levels generally range from .8 to 1.0 grams per deciliter.⁶ Despite experiencing acute renal failure in the hospital, when discharged on July 22, 2005, claimant's creatinine was down to 1.9.

Respondent presented the testimony of Dr. Richard A. Huseman, who is board-certified in internal medicine and formerly board-certified in nephrology. Considering claimant's creatinine readings taken as far back as 1999, Dr. Huseman did not believe claimant sustained permanent damage to his kidneys from either the July 2005 accident or the acute renal failure he experienced in the hospital. The doctor testified, in part:

Q. (Mr. Bellemere) And medically what's the relevance of that -- of that finding by you? I mean, what is that? What does that support? Does that support that he's got some permanent damage done to his kidneys and ultimately his renal function or as a result of this event or not?

A. (Dr. Huseman) First off, it does support the fact that he does have some long-term kidney problems, some chronic renal failure. This was noted earlier in records. I also reviewed records from his primary physician who intermittently did some creatinines. Effectively in 1999 he had a creatinine of 1.2. In April of '04 [sic] he had a creatinine of 1.5. In December of '02 he had a creatinine of 1.6. Then when he entered the hospital in Sioux City, Iowa in July he had a creatinine of 2.3, came out of the hospital with a creatinine of 1.9, went in the other hospital with a creatinine of 2.0, which went up to 2.2 and then down again within the third day to 1.8. Effectively if you look at these levels, they're pretty much all the same throughout the period of time. Specifically, from when he entered the hospital in Sioux City, Iowa, to when he came out, his creatinine effectively was back down to what I would assume to be his normal chronic state. In other words, with his hospitalization I don't think that the acute changes in the hospital caused him any permanent damage to his kidneys, and that all his creatinine changes or higher creatinine are related to his chronic polycystic kidney disease which was shown to be present prior to his accident with elevated creatinines upwards of three years prior to the accident.

Q. Would that, Doctor, be your opinion with regard to whether or not he has in fact sustained permanency with regard to this event?

A. Yes. I don't think that he had any permanent damage to his kidneys related with the trauma that he suffered in July of '05.⁷

scans can stop the kidneys from working for a short period of time.

⁶ Huseman Depo. at 11.

⁷ *Id.* at 16, 17.

Moreover, the doctor testified he felt the rise in claimant's creatinine level from 1.6 in 2002 to 1.9 in July 2005 was related to claimant's underlying chronic renal disease.⁸

Dr. Huseman never examined claimant but merely reviewed his medical records.

On the other hand, claimant's medical expert, Dr. P. Brent Koprivica, who is board-certified in both emergency medicine and occupational medicine, examined claimant in September 2006 and testified that he thought claimant had a 10 percent whole person impairment due to an aggravation to his chronic kidney condition. But the record does not disclose whether Dr. Koprivica was aware that claimant had abnormally high creatinine levels in 1999 and 2002. The doctor also testified the only evidence he found that claimant's renal function had decreased was that claimant's creatinine was 1.9 on July 19, 2005, and was 2.0 in October 2005. But Dr. Koprivica indicated that change in readings may have been due merely to the natural worsening of the underlying polycystic disease.⁹

The Board concludes claimant has failed to prove he has experienced a permanent worsening of his kidneys or permanent impairment to his kidneys as a result of his July 2005 accident. Accordingly, claimant is not entitled to receive permanent disability benefits for his kidneys. The Board affirms the Judge's findings in that respect.

Subdural hematoma

Dr. Koprivica testified that subdural hematomas may cause confusion, headaches, memory problems, personality changes, and even death. Claimant's subdural hematoma was located in the frontal lobe area of his brain with the collection of blood being larger on the right side than the left. The doctor related the subdural hematoma to the July 2005 accident because claimant was confused at the accident scene and the emergency room trauma sheet indicated he had a laceration and trauma to the right side of his head where the subdural hematoma was located.¹⁰ The doctor testified, in part:

And the flow sheet that was on the initial emergency room trauma sheet, they had like a pain diagram and they show where there's injury, and the right side of [the] head is marked, a laceration there, so he had a direct blow in the area where the subdural was identified.

⁸ *Id.* at 23.

⁹ Koprivica Depo. at 54, 55.

¹⁰ *Id.* at 26.

So my belief was that that would be supportive that there was a direct head injury, that there wasn't evidence of a head injury but there really was indeed direct head injury that occurred, that he had confusion at the scene which would go along with a head injury. And oftentimes it will clear initially and then over time as the subdural expands they will become more confused or the deficits become greater because of the intracranial pressures increasing as it expands.

There's two major kinds of hematomas that we see, and there's others, but subdural versus epidural. Subdural is a venous bleed which means it's slow and so it expands at a slow rate so those things can take weeks and months before they manifest that you have to do something. An epidural, if you don't evacuate it they die within hours.¹¹

According to Dr. Koprivica, when claimant underwent surgery in October 2005 to evacuate the hematoma, the surgeon found both acute and chronic bleeding that related back to the July 2005 accident.¹²

Using the AMA *Guides*,¹³ Dr. Koprivica rated claimant's whole person impairment at 14 percent for the head trauma he sustained in his accident.¹⁴

Dr. Vito J. Carabetta, who specializes in physical medicine and rehabilitation, examined claimant in March 2008 at respondent's request. Because his examination was primarily focused upon claimant's back and knee injuries and he was never asked to address the subdural hematoma, Dr. Carabetta was not comfortable providing an expert opinion regarding the cause of claimant's subdural hematoma. But the doctor did indicate that claimant's underlying kidney disease may have predisposed him to developing a subdural hematoma. Dr. Carabetta testified, in part:

Q. (Mr. Kolich) Historically, though, it makes sense, doesn't it, Doctor, with that kind of trauma and the the *[sic]* subdural later, that the subdural is related to the trauma?

A. (Dr. Carabetta) You have an impact with a train and a truck, many things become possible as the body gets bounced around.

¹¹ *Id.* at 26, 27.

¹² *Id.* at 29, 30.

¹³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹⁴ *Id.* at 32.

Q. And as you mentioned, the existence of the polycystic kidney disease may have made it easier for him to have a subdural as it predisposed him for such; is that right?

A. That would be very likely to work in the favor of the development of a subdural.¹⁵

Another of respondent's experts, Dr. Michael E. Ryan, indicated he was unable to state with certainty the cause of claimant's subdural hematoma.¹⁶ Dr. Ryan is a neurologist who was hired by respondent to review claimant's medical records and to try to determine whether claimant's subdural hematoma was caused by the July 2005 accident. The doctor did not examine claimant.

The Board finds Dr. Koprivica's testimony persuasive. Claimant had evidence of a head trauma following the accident as he had either a laceration or abrasions on his head, he was confused immediately following the accident, and he later developed progressive symptoms that were indicative of slow subdural bleeding. In addition, the subdural hematoma was located in the same area of the abrasions to the head. The Board further finds that as a result of the trauma to the head claimant experiences problems with his memory and headaches.

In short, the Board affirms the Judge's finding that claimant sustained a 14 percent whole person impairment due to the head injury he sustained in the July 2005 accident.

3. Is respondent obligated to pay the medical expense claimant incurred for evacuating the subdural hematoma?

As indicated above, the Board finds it is more probably true than not that claimant sustained a head trauma in the July 2005 accident and that as a result he developed a subdural hematoma. In addition, the Board finds the subdural hematoma continued to expand following the accident and ultimately required claimant to undergo two surgical procedures to evacuate the blood that was pooling in claimant's skull.

The Board is persuaded by Dr. Koprivica's testimony that the blood that pooled in claimant's skull and that was later evacuated in two surgical procedures was caused by the July 2005 accident. Likewise, the Board finds the medical evidence establishes that claimant's underlying kidney disease may have predisposed him to a subdural hematoma and that it is more probably true than not that the trauma claimant experienced in the July 2005 accident caused the subdural hematoma to form. Consequently, respondent is

¹⁵ Carabetta Depo. at 27.

¹⁶ Ryan Depo. at 8.

obligated to pay the medical expense claimant incurred for both surgeries to evacuate pooled blood from his skull and relieve the pressure on his brain.

CONCLUSION

Based upon the above, the Board affirms the Judge's finding that claimant sustained a 23 percent whole person impairment as a result of the injuries he sustained to his low back, right knee, and head in the July 2005 accident. Claimant failed to prove he sustained permanent injury or aggravation to his kidneys and, therefore, claimant is not entitled to receive permanent disability benefits for his kidneys. Finally, respondent is obligated to pay the entire medical expense claimant incurred to treat his subdural hematoma, including the expense incurred in February 2006 for the second surgery to evacuate blood from his skull.

AWARD

WHEREFORE, the Board modifies the June 23, 2008, Award entered by Judge Hursh by requiring respondent to pay the entire medical expense claimant incurred for treating his subdural hematoma subject to the fee schedule. The Board affirms the Award with respect to claimant receiving permanent disability benefits under K.S.A. 44-510e for a 23 percent whole person functional impairment.

Elmar Hirsch is granted compensation from TransAm Trucking, Inc., for a July 15, 2005, accident and resulting disability. Based upon an average weekly wage of \$541.62, Mr. Hirsch is entitled to receive 45 weeks of temporary total disability benefits at \$361.10 per week, or \$16,267.10, plus 88.55 weeks of permanent partial general disability benefits at \$361.10 per week, or \$31,975.41, for a 23 percent permanent partial general disability, making a total award of \$48,242.51, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The majority awards claimant a 23 percent permanent partial disability to the body as a whole for his injuries. The Kansas Supreme Court in *Casco*¹⁷ emphasized that scheduled injuries are the general rule and nonscheduled injuries are the exception. Accordingly, if an injured body part is on the schedule in K.S.A. 44-510d, then the compensation for that injury must be calculated pursuant to that schedule. The claimant's leg (right knee) is on the schedule.¹⁸ Therefore, any portion of the permanent partial disability awarded by the majority that corresponds to the permanent impairment rating for the leg (right knee) must be calculated pursuant to K.S.A. 44-510d(a)(16). Neither the head nor back are contained within the schedules of K.S.A. 44-510d. An injury to the head or back is an unscheduled injury. Accordingly, the portion of the 23 percent permanent partial disability award that corresponds to the head and back injuries should be calculated pursuant to K.S.A. 44-510e.

Nowhere does K.S.A. 44-510d say that scheduled injuries that occur simultaneously with nonscheduled injuries should be compensated as general body disabilities under K.S.A. 44-510e. By combining the impairment rating for claimant's scheduled injury to his right knee with the ratings for his unscheduled injuries to his head and back, the majority is reading something into K.S.A. 44-510d that is not in the statute. *Casco* requires that

¹⁷ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 10, 154 P.3d 494, rev. denied ____ Kan. ____ (2007).

¹⁸ K.S.A. 44-510d(a)(16).

combinations of scheduled injuries be compensated separately regardless of whether the injuries occurred separately, simultaneously, or as a result of a natural progression. Likewise, K.S.A. 44-510d and K.S.A. 44-510e should be applied separately, such that combinations of scheduled and nonscheduled injuries should be compensated separately.

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Fred Bellemere, III, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge